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Exempt From Filing Fees Pursuant To California Government Code §6103

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 YAXIAN FAN

14 Plaintiff,

15 vs.
16

17 CITY OF NEWPORT BEACH; and
18 KEITH E. RODENHUIS,

19 Defendants.
20
21

Case No.: 8:22-CV-02178-FWS-(DFMx)

**DEFENDANT CITY OF NEWPORT
BEACH'S NOTICE OF MOTION AND
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

DATE: January 25, 2024
TIME: 10:00 a.m.
JUDGE: Hon. Fred W. Slaughter
DEPT.: 10D

22 **TO THE COURT, ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**
23

24 NOTICE IS HEREBY GIVEN THAT on January 25, 2024 at 10:00 a.m. before
25 the Honorable Fred W. Slaughter in Courtroom 10D of the United States Courthouse for
26 the Central District of California, Southern Division, 411 West 4th Street, Santa Ana,
27 California, Defendant CITY OF NEWPORT BEACH ("Defendant" or "City") will and
28 hereby does move the Court to dismiss the Second Amended Complaint ("SAC") for

1 “Response Civil Minutes to Pursuant Fair Justice and Children’s Safety, Continue for the
2 Scheduled Court Trial on May 16, 2024.” (Docket No. 31) pursuant to *Federal Rule of*
3 *Civil Procedure*, Rule 12(b)(6) for failure to state a claim upon which relief can be
4 granted.

5 Pursuant to Local Rule 7-3, on November 14, 2023, Defendant’s counsel sent
6 Plaintiff, Yaxian Fan (“Plaintiff”) a meet and confer letter identifying the defects of
7 Plaintiff’s lawsuit. On November 15, 2023, counsel for Defendant also spoke with Fan
8 to confer. Counsel explained that (1) Plaintiff could not sue under the federal question
9 jurisdiction as the *Noerr-Pennington* doctrine immunized the Defendants from the
10 allegations alleged in her SAC and (2) Plaintiff’s premises liability claim was dismissed
11 without leave to amend. All efforts to educate and persuade Ms. Fan to dismiss her SAC
12 failed and the parties were unable to reach a resolution other than to the date for hearing
13 of the motion. Decl. of Keith E. Rodenhuis, ¶ 2-5.

14 As set forth in the accompanying Memorandum of Points and Authorities, there is
15 good cause for the relief requested. Plaintiff fails to state a claim upon which relief can
16 be granted. Specifically, Plaintiff fails to allege facts showing any question of federal
17 law. Instead, Plaintiff is alleging a conspiracy between KER Legal Group and the entire
18 state court system arising out of her general negligence case for personal injuries. Yet
19 Plaintiff still fails to assert any articulable cause of action against The City. The
20 premises liability claim against the City was dismissed with prejudice. Additionally, the
21 City is protected under the *Noerr-Pennington* doctrine for any other allegations alleged
22 in the SAC against the City.

23 This Motion is based on this Notice of Motion and Motion; the accompanying
24 Memorandum of Points and Authorities; Declaration of Keith E. Rodenhuis; the
25 pleadings and papers filed in this action; and such further argument and matters as may
26 be offered at the time of the hearing of this Motion.

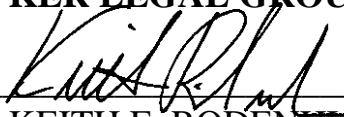
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1 DATED: November 21, 2023

Respectfully submitted,
KER LEGAL GROUP

2
3 BY:



KEITH E. RODENHUIS, ESQ.
Attorney for Defendant,
City of Newport Beach

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I. INTRODUCTION

Plaintiff, YA XIAN FAN, (“Fan” or “Plaintiff”) initially filed this suit against the CITY OF NEWPORT BEACH (the “City”) seeking to recover for injuries she sustained **on May 15, 2018 – over four and a half years ago** - when she jumped off a lifeguard tower near 1600 W Balboa Blvd in Newport Beach, California. (See, Docket No. 1).

Plaintiff’s original Complaint sued under diversity jurisdiction (See Docket No. 1). Thereafter, Plaintiff filed a First Amended Complaint (“FAC”) which was dismissed by way of the City’s granted Motion to Dismiss. Plaintiff’s Premises Liability Claim was dismissed without leave to amend. Plaintiff’s 42 U.S.C. §1983 Claim was dismissed with leave to amend.

Plaintiff now “files 2nd amended complaint for response civil minutes to pursuant fair justice and children’s safety, continue for the scheduled court trial on May 16, 2024.” While this is Plaintiff’s third attempt to file a meritorious federal lawsuit against the City and now against defense counsel, Keith Rodenhuis¹, the defects of the Plaintiff’s Second Amended Complaint (“SAC”), as addressed in the Court’s Minute Order granting the City’s Motion to Dismiss the FAC, remain in the SAC.

While dismissed without leave to amend, Plaintiff continues to litter her SAC with her premises liability claim. Additionally, Plaintiff’s 42 U.S.C. §1983 claims must be dismissed for the same reasons it was previously dismissed from the FAC. The Defendant’s alleged conduct is immune under the *Noerr-Pennington* doctrine.

II. FACTS AND PROCEDURAL BACKGROUND

On May 15, 2018, Plaintiff, a 66-year-old California citizen and resident of Irvine, California, went to the beach with her family. Plaintiff walked the beach and decided to take a break to soak in the bayside views. Plaintiff saw an unmanned lifeguard tower and decided it was the perfect place to rest. She climbed to the top platform where she sat

¹ Defendants City of Newport Beach and Keith E. Rodenhuis collectively referred to herein as “Defendants”.

1 with her legs dangling for approximately ten (10) minutes before deciding to jump
 2 down. As her feet hit the sand, the momentum caused her to fall forward into the sand
 3 thereby (allegedly) injuring her left arm and side.²

4 On May 24, 2019, Plaintiff filed a civil action in Orange County Superior Court
 5 (“OCSC”) for the exact same claims and set of facts as the instant case. See, OCSC Case
 6 No. 30-2019-01072057-CU-PO-NJC. Plaintiff’s OCSC case was dismissed by way of a
 7 motion for summary judgment which the Court of Appeal, Fourth District affirmed.
 8 Plaintiff’s petition for review was also denied by the California Supreme Court.
 9 Plaintiff’s claim has already been fully adjudicated. Plaintiff is now suing in federal
 10 district court pursuant to 28 U.S.C. § 1331: Federal Question.

11 The SAC essentially alleges (1) an improper premises liability claim against the
 12 City and (2) that Defendants allowed the OCSC courtroom clerk to hold onto Plaintiff’s
 13 documents, recovered costs against Plaintiff as the prevailing party in that suit, and filed
 14 and later withdrew a sanctions motion against Plaintiff. Specifically, Plaintiff asserts
 15 numerous allegations³ against the City – all of which, if accepted as true, are protected
 16 under the *Noerr-Pennington* doctrine.

17 Plaintiff is now presenting this SAC in an attempt to delay paying costs owed the
 18 City related to the Superior Court lawsuit and for the improper purpose of harassing the
 19 City of Newport Beach and its counsel for diligently defending the state claims against
 20

21 ² These facts were undisputed in the motion for summary judgment filed in the Orange
 22 County Superior Court by Defendant City of Newport Beach. The City’s motion was
 23 granted, and the Plaintiff’s appeal denied. See, OCSC Case No. 30-2019-01072057-
 24 CU-PO-NJC. While not germane to this motion, the City includes them to provide the
 Court with case background and context.

25 ³ See SAC, p. 2:13-15; SAC, p. 2:21-24; SAC, p. 2:26-3:2; SAC, p. 3:3-6; SAC, p.
 26 3:13-16; SAC, p. 4:8-12; SAC, p. 8:20-25; SAC, p. 9:1-4; SAC, p. 10:3-9; SAC, p.
 27 10:26-28; SAC, p. 11:5-6; SAC, p. 11:28-12:5; SAC, p. 12:22-23; SAC, p. 14:5-9;
 28 SAC, p. 15:26-16:2; SAC, p. 16:19-21; SAC, p. 17:2-3; SAC, p. 17:17-22; SAC, p.
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the City and being the prevailing party.

III. ARGUMENT AND MEMORANDUM OF LAW

A. **THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PER F.R.C.P., RULE 12(B)(6).**

A complaint may be dismissed for failure to state a claim “where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.” *Zamani v. Carnes*, 491 F.3d 990, 996 (9th Cir. 2007). In considering whether a complaint states a claim, a court must accept as true all of the material factual allegations in it. *Hamilton v. Brown*, 630 F.3d 889, 892-93 (9th Cir. 2011). However, the court need not accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

Although a complaint need not include detailed factual allegations, it “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible when it “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The complaint “must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

“A document filed pro se is ‘to be liberally construed,’ and a ‘pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’” *Woods v. Carey*, 525 F.3d 886, 889-90 (9th Cir. 2008). However, liberal construction should only be afforded to “a plaintiff’s factual allegations,” *Neitzke v. Williams*, 490 U.S. 319, 330 n.9, 109 S. Ct. 1827, 104 L. Ed. 2d 339 (1989), and the Court need not accept as true “unreasonable inferences or assume

the truth of legal conclusions cast in the form of factual allegations.” *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003).

A. PLAINTIFF’S IMPROPERLY FILED CLAIM FOR PREMISES LIABILITY IN VIOLATION OF PREVIOUS COURT MINUTE ORDER.

Beyond the premises liability claim, Plaintiff fails to state *any* allegations against the City of Newport Beach. The premises liability claim has already been adjudicated in California state court and is time-barred. According to the Court’s September 29, 2023 Minute Order, “The court also finds granting Plaintiff leave to amend her premises liability claim would be futile because it is time-barred. See, e.g., *Anderson v. Anthem Blue Cross*, 776 F. App’x 465, 465 (9th Cir. 2019) (affirming dismissal of claims barred by the statute of limitations without leave to amend) . . . The court also **DISMISSES** Plaintiff’s premises liability claim against Defendant **WITHOUT LEAVE TO AMEND.**” Docket No. 28 – Minute Order Granting Defendant’s Motion to Dismiss Plaintiff’s FAC.

As Plaintiff failed to present any claim against the City of Newport Beach but the Premises Liability Claim, the SAC should be dismissed against the City without leave to amend.

B. PLAINTIFF’S 42 U.S.C. SECTION 1983 CLAIM FAILS.⁴

To the extent Plaintiff alleges a 42 U.S.C. section 1983 claim against Defendants based on their litigation conduct, Plaintiff’s allegations all relate to conduct protected under the *Noerr-Pennington* doctrine and the SAC does not plausibly allege facts suggesting the “sham” exception to that doctrine applies.

“The *Noerr–Pennington doctrine* . . . provides that litigation activity (including pre-litigation cease-and-desist letters) cannot form the basis of liability unless the

⁴ While it appears the Plaintiff’s 42 U.S.C section 1983 claim is only directed at Defendant Keith E. Rodenhuis, out of an abundance of caution, it is also addressed herein as it may relate to the City.

litigation is a ‘sham.’” *B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527, 532 n.1 (9th Cir. 2022) (quoting *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 347 n.1 (9th Cir. 2014)) (citations omitted); *see also Empress LLC v. City & Cnty. of S.F.*, 419 F.3d 1052, 1056 (9th Cir. 2005) (“Under the *Noerr-Pennington* doctrine, those who petition all departments of the government for redress are generally immune from liability” and immunity thereunder “applies to claims under § 1983 that are based on the petitioning of public authorities”). The doctrine extends “to litigation activities by government actors and their attorneys.” *B&G Foods N. Am.*, 29 F.4th at 536; *see also Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645 (9th Cir. 2009)) (“The agents of that litigation—employees and law firms and lawyers—may benefit from the immunity as well.”).

To determine whether the *Noerr-Pennington* doctrine immunizes a party’s conduct, the court performs a three-step analysis that examines: “(1) ‘whether the lawsuit imposes a burden on petitioning rights,’ (2) ‘whether the alleged activities constitute protected petitioning activity,’ and (3) ‘whether the statute[] at issue may be construed to [avoid] that burden.’” *Id.* at 535 (quoting *Kearney*, 590 F.3d at 644). If the answer to each step is “yes,” then the City and defense counsel’s conduct is immunized. *Ibid.*

As explained below, and as the Court has previously determined (see, Docket No. 28 – Court Minute Order re. Motion to Dismiss FAC), the answer to each step of the *Noerr-Pennington* doctrine analysis as to Plaintiff’s claims is “yes” and the Defendant’s conduct is therefore protected.

1. Step 1: Fan’s Suit Burdens the City’s Petitioning Rights.

Step one of the *Noerr-Pennington* doctrine analysis asks, “whether the success of [Plaintiff’s] lawsuit would constitute a burden on petitioning rights.” *Kearney*, 590 F.3d at 645. In conducting this inquiry, the court does not consider any alleged misconduct tied to the petitioning activities. *Id.* Rather, when the petitioning activity is incidental to the prosecution of a suit, the question is whether plaintiff’s lawsuit “places a burden on

1 [defendant's] ability” to prosecute its suit. *Id.*

2 At the first step, the SAC challenges defensive petitioning activity by the City
3 and defense counsel such that “the success of [Plaintiff’s] lawsuit would constitute a
4 burden on petitioning rights.” *See Kearney*, 590 F.3d at 645. In the present case, the
5 Defendants’ lobbying was directed at two distinct ends—opposing Plaintiff’s case
6 against the City of Newport Beach and stopping the harassing filing of documents
7 against the City once the Court granted the City’s Motion for Summary Judgment and
8 Plaintiff’s case was effectively over.

9 Accordingly, the answer to the first step of the *Noerr-Pennington* doctrine
10 analysis is “yes”.

11 **2. Step 2: Defendant’s Conduct is Protected Petitioning Activity.**

12 The federal courts have determined that protected petitioning activity extends to
13 litigation activities by government actors and their attorneys by holding that conduct
14 related to an eminent domain suit, which allegedly violated § 1983, was protected
15 petitioning. *Kearney*, 590 F.3d at 644– 45. “*Noerr–Pennington* immunity, and the
16 sham exception, also apply to defensive pleadings . . . because asking a court to deny
17 one’s opponent’s petition is also a form of petition” (citation omitted). *Freeman v.*
18 *Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005).

19 The activities alleged in the SAC, namely filing motions in state court and
20 litigating the case, constitute petitions and “conduct incidental to the prosecution of the
21 suit” is protected by the *Noerr-Pennington* doctrine. *See Sosa v. DIRECTV, Inc.*, 437
22 F.3d 923, 933 (9th Cir. 2006) (stating “litigation activities which constitute
23 communications to the court may be fairly described as petitions,” including “[a]
24 complaint, an answer, a counterclaim and other assorted documents and pleadings, in
25 which plaintiffs or defendants make representations and present arguments to support
26 their request that the court do or not do something”) (internal quotation marks,
27 alterations, and citations omitted); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180,
28 1184 (9th Cir. 2005).

1 Again, the answer to the second step of the *Noerr-Pennington* doctrine analysis is
2 “yes”.

3 **3. Step 3: §1983 Cannot Be Construed to Avoid Burdening**
4 **Defendant’s Protected Petitioning Activity.**

5 The federal courts ask at step three whether the statute—here 42 U.S.C. § 1983—
6 can be construed to avoid burdening Defendants’ Petition Clause rights. See *Sosa*, 437
7 F.3d at 931; see also *id.* at 932 (“Where ... the burdened conduct could fairly fall within
8 the scope of the Petition Clause and a plausible construction of the applicable statute is
9 available that avoids the burden, we must give the statute the reading that does not
10 impinge on the right of petition.”).

11 At the third step, Plaintiff has not identified any aspect of section 1983 that
12 proscribes the City and defense counsel’s litigation conduct at issue here. See, e.g.,
13 *Williams v. Jones & Jones Mgmt. Grp.*, 2015 WL 349443, at *9 (C.D. Cal. Jan. 23,
14 2015) (finding plaintiff’s § 1983 claim, *inter alia*, barred by the *Noerr-Pennington*
15 doctrine where plaintiff did not identify how § 1983 proscribed defendants’ litigation
16 activities).

17 Thus, the *Noerr-Pennington* doctrine bars Plaintiff’s section 1983 claims against
18 the City and defense counsel unless a sham exception applies.

19 **4. The Sham Exception to the Noerr-Pennington Doctrine**
20 **Does Not Apply.**

21 The Ninth Circuit has identified “three circumstances in which the sham
22 litigation exception might apply,” including: (1) “where the lawsuit is objectively
23 baseless and the [party’s] motive in bringing it was unlawful”; (2) “where the conduct
24 involves a series of lawsuits ‘brought pursuant to a policy of starting legal proceedings
25 without regard to the merits’ and for an unlawful purpose”; and (3) “if the allegedly
26 unlawful conduct ‘consists of making intentional misrepresentations to the court,
27 litigation can be deemed a sham if ‘a party’s knowing fraud upon, or its intentional
28 misrepresentations to, the court deprive the litigation of its legitimacy.’” *Sosa*, 437 F.3d

1 at 938 (quoting *Kottle v. NW. Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998)). Here,
 2 Plaintiff does not adequately allege that her section 1983 claims fall within a “sham”
 3 exception to the *Noerr-Pennington* doctrine.

4 “A **winning lawsuit** is by definition a reasonable effort at petitioning for redress
 5 and therefore **not a sham.**” *White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000)
 6 (emphasis added).

7 With respect to the first sham exception, Plaintiff has not sufficiently alleged that
 8 the City and defense counsel’s defense was “baseless” such that “no reasonable litigant
 9 could realistically expect success on the merits” *because that judgment was entered in*
 10 *the City’s favor* (and thus a “winning lawsuit”) in the state court suit. *B&G Foods N.*
 11 *Am.*, 29 F.4th at 538; *see also White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000).

12 The second sham exception does not apply because Plaintiff does not allege “a
 13 series of lawsuits.” *See id.* Instead, Plaintiff only makes allegations relating to a single
 14 lawsuit (Orange County Superior Court Case No. 30-2019-01072057-CU-PO-CJC).

15 Finally, with respect to the third sham exception, Plaintiff has not adequately
 16 alleged any intentional misrepresentations that the City or defense counsel made to the
 17 court during the state court proceedings. *See Sosa*, 437 F.3d at 938.

18 For all the foregoing reasons, Plaintiff’s section 1983 claim against Defendant
 19 Keith E. Rodenhuis is barred by the *Noerr-Pennington* doctrine.

20 IV. CONCLUSION.

21
 22 As a matter of law, the Plaintiff’s lawsuit is without merit and frivolous. The
 23 Second Amended Complaint fails to articulate a basis for this Court to have
 24 jurisdiction. On its face, all Plaintiff’s allegations relate to conduct protected under the
 25 *Noerr-Pennington* doctrine and the SAC does not plausibly allege facts suggesting the
 26 “sham” exception to that doctrine applies. Ms. Fan has failed to provide any other basis
 27 for federal jurisdiction.


28 Accordingly, Defendant City of Newport Beach respectfully requests that this

1 Motion to Dismiss be granted, with prejudice.

2
3 Dated: November 21, 2023

Respectfully Submitted,

4 **KER LEGAL GROUP**

5
6 By:  _____

7 KEITH E. RODENHUIS, ESQ.

8 Attorney for Defendant

9 City of Newport Beach